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Howard C. Anawalt

Santa Clara University School of Law, hanawalt@scu.edu

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CHOOSING JUSTICE

HOWARD C. ANAWALT*

The predominant view in the United States today is that the Supreme Court makes basic social choices for the nation. Furthermore, that view is that the choices are made on the basis of a liberal-conservative dichotomy. The view of the Court as basic policy-maker is continually nurtured by journalists, influential legal scholars, and professional politicians. As is usually the case, the accepted view of power reflects the actual distribution of power. In the case of Supreme Court agenda power, I believe the popular view has created the reality, rather than merely mirroring it.

The Supreme Court and other federal courts determine policy in areas of great importance: freedom of speech, the scope of free exercise of religion, access to print and electronic media, protection of reputation, rights of personal intimacy, the right to refuse medical treatment, access to new technologies, antitrust policies, distribution of economic and social opportunities, and the capacity of communities to identify and nurture values. This list is not complete, but it certainly demonstrates an enormous scope of judicial power.

Federal courts are a strange kind of institution to wield such power in a democracy. Of the three branches they are the least democratic. The judges and Justices are not elected. They serve for life. They operate within an order of strict authority and hierarchy. Courts enforce tight traditional decorum, and do so through the personal decisions of the presiding judge and his or her power of contempt. The agenda in any federal courtroom is tightly confined by rules of evidence, presumptions, and detailed procedural requirements. A five-to-four Supreme Court decision

* Professor of Law, Santa Clara University. B.A. 1960, Stanford University; J.D. 1964, University of California (Boalt Hall). Professor Anawalt has taught, lectured, and written on constitutional law since 1968. He teaches and practices law in high-technology-related fields, especially protection of intellectual property. In connection with this essay, he particularly wants to remember Professor Russell W. Galloway, Jr., his valued and trusted colleague who died shortly after the completion of this essay.

that overturns an act of Congress or a long line of lower court precedents binds all, but it does so not because the majority is right, but because the Court is "supreme" and final.

Congress and the presidency share some of these attributes. Both of these branches surround themselves with power and authority. Both are somewhat removed from the people. Nevertheless, both of these institutions are subject to election and are intended to be the focal point of political influence. Members of the House and the Senate do make contact with their constituents and listen to their opinions on matters of policy. However, basic norms of judicial procedure bar the courts from engaging in any kind of equivalent interplay.

"We the people" are in a pickle. The Justices of the Supreme Court set our agenda, but we cannot pick them. We cannot even get rid of them once they are on the Court.¹ If the people are stuck with Justices who fall neatly on one or the other side of a liberal-conservative party line, then there is bound to be the kind of political frenzy that we have seen in recent nomination hearings.

I. EXAMINING A NOMINEE'S PHILOSOPHY

The Senate should examine such matters as the nominee's background, candor, temperament, competence, and compassion. The Senators also need to gain an understanding of the nominee's reasoning processes including such attributes as patience, experience, logic, and knowledge of the law.

In two recent nomination hearings, the Senate Judiciary Committee attempted to delve into the nominee's constitutional philosophy or constitutional politics.

The Senators grilled Judge Bork intensely on his judicial philosophy. They pressed him to explain his understanding of the Constitution and to explain and justify his philosophy or attitudes concerning its interpretation. Judge Bork entered into the give and take with gusto. The American public learned a great deal about the Constitution during those hearings, but the hearings also

¹ No one, I think, would argue that the impeachment power is an ample means of restricting judicial agenda setting.

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proved to be the undoing of the nominee.

One practical lesson of the Bork nomination is for nominees to keep a low profile. Justices Souter and Kennedy managed to do just that and were easily confirmed. For whatever reasons, the Senators scarcely penetrated the veneer of the nominees' knowledge of precedents and current Supreme Court formulas or constitutional "tests."

A number of the Senators attempted to draw Justice Thomas out on issues of constitutional philosophy, but they were less successful than in the case of Judge Bork. Justice Thomas was pressed for his positions on "natural law," affirmative action, and *Roe v. Wade*.² He gave careful but bland responses on the first two matters and declined to get into the abortion issue.

Should the Senators probe the constitutional or political philosophy of nominees? I think they should. They should make this inquiry in order to rate the qualities of reason, patience, inquiry and articulation presented by the nominee's responses. It is also appropriate for Senators to consider the general philosophy of the nominee. For example, is he or she inclined toward expanding implied rights under the Constitution?

At the same time, it is essential that Senators resist voting the nominee up or down on the basis of his or her position on a particular issue. The key attitude for Senators to adopt is to take the full range of qualities into consideration, rather than insist on some "party line" set of beliefs. It is difficult to adhere to this approach, but not more difficult than it is to retain an open mind when one is sitting as a judge. Some Senators will discipline themselves to an approach that is free from a party line, while others will be largely influenced by ideology, partisanship, or personal likes and dislikes when they cast their votes. No system or set of rules can assure that Senators will follow a non-ideological standard. Nevertheless, there is reason to expect that such a general standard will carry great weight in influencing their votes.³

Proponents and opponents of Bork and Thomas waged media

² 410 U.S. 113 (1973).

³ Many Senators currently follow a general standard that they should "vote for the President's pick," unless they find compelling reasons to depart from it. That is precisely the type of standard that should be left well behind us in the future.

and public opinion campaigns for and against the nominees. As I recall, some aspects of these campaigns were troubling in that they seemed to oversimplify or distort the views or records of the nominees. Distortion is particularly disturbing in the case of Supreme Court nominations, because it represents a strain of anti-intellectualism or irrationality that runs directly against the fundamental rationality that is expected of the Supreme Court.⁴ The primary antidote to public relations distortion with regard to nominations is thoughtful sifting by Senators.⁵

II. THE GENUINELY POLITICAL ROLE OF THE COURT

Now, I will turn my attention to a critique of the Court's role and some suggestions for reform.

The Supreme Court plays a political or policy-making role, but that role should be a limited one. Some of the choices the Court makes should be basic ones, but those choices should be confined to norms that are fairly clearly to be derived from statutes or from the Constitution itself—its terms, its structure, and its history.⁶ This is a traditional view of the Court's role, and follows from notions expressed in the *Federalist* papers and *Marbury v. Madison*.⁷ As the Supreme Court has said, it should avoid acting as a "super-legislature."⁸

I believe it is important to restrict the role of the Court, because I am convinced that the civil order a people live under is approximately as good or effective as the people themselves are. The social order and values reflect the maturity of the people. The trouble with having a single small court prescribe major solutions for a people is that the solutions are imposed from above, or

⁴ This is one of the amazing contradictions in the public attitudes towards the Justices: they are expected to make ultimate political choices, yet be above politics!

⁵ A serious defect of the nomination process is the fact that the Senate Judiciary Committee has been composed of all white males. This points to a serious institutional defect in the Senate itself.

⁶ There has been a great deal of writing on this subject. For some very interesting articles see Thomas C. Grey, *Do We Have an Unwritten Constitution?*, 27 STAN. L. REV. 703 (1975); Sanford Levinson, *Law As Literature*, 60 TEX. L. REV. 373 (1982); Frederick Schauer, *Easy Cases*, 58 S. CAL. L. REV. 399 (1985).

⁷ 5 U.S. 137, 173-78 (1803); see also THE FEDERALIST NO. 51 (James Madison); *Id.* No. 78 (Alexander Hamilton).

⁸ *Griswold v. Connecticut*, 381 U.S. 479, 482 (1965).

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from “out there” somewhere, rather than through the growth of the entire nation’s understanding and experience. This leads me to conclude that major choices for the people should stem from themselves and from representative bodies that honestly reflect their views.⁹

Some basic policy-making roles are assigned to the Court by the Constitution. One example is the Court’s role in restraining states from burdening interstate commerce. Another example is the undoubted role of the Court to set aside state laws that conflict with federal laws.¹⁰ Policy-making is also assigned to the Court by certain statutes, as is the case with the federal antitrust laws.

The Court faces its most difficult policy choices when it interprets or implies the existence of constitutional rights. When the Court faces a question of interpretation of a norm set forth in the Constitution, for example freedom of speech, its task is fairly straightforward. The Court must debate and determine what the norm means in the given instance, but the existence of the norm is not in doubt.¹¹

The more difficult task is the matter of implying or creating new rights such as privacy, abortion, control of medical care, the right to vote, and others. It is proper for the Court to be active in these areas and indeed to establish rights that are, in a real sense, new to the Constitution. Nevertheless, the root or grounding of the right must be firmly based in the Constitution, its structure, or its history. Otherwise, the Court has indeed strayed beyond its traditional function. More importantly, it strays beyond a healthy role, because it imposes basic norms on people who have not acted to create the norms for themselves. The Constitution acts as a very deep keel of a ship, to keep our people on the general course which the people themselves have chosen.¹² Ultimately it is the people who must choose justice.

⁹ There are major deficiencies in the constituency of our representative bodies. These problems stem in large part from the influence of money and its impact on mass media.

¹⁰ U.S. CONST. art. VI.

¹¹ The problem is more difficult when two norms collide, for example, when speech and fair trial norms conflict.

¹² This is reflected in the very first words of the Constitution: “We the People of the United States . . . do ordain and establish this Constitution for the United States of America.” U.S. CONST. pmbl.

I have many colleagues, friends, and students who strongly disagree with these views about a limited role for the Supreme Court. In some instances they want or expect more from the Court than what these views allow. They expect more justice and believe, apparently, that justice must come from the Court. I would like these friends and colleagues to consider some additional problems that attend giving too much power to the courts.

The Supreme Court did create a right of a woman to choose whether to continue a pregnancy, but its decisions have never assured that right to the poor.¹³ The Supreme Court has helped create magnificent strides in equality for all peoples, but it was federal legislation that achieved the largest practical results in desegregating schools. Reduction of discrimination in private employment has been achieved entirely by statute. Reliance on judicial agenda setting cannot produce broad effective action on an array of general social problems.¹⁴

Another problem with too much reliance on the Justices is a genuine misperception of what such dependence means as a matter of practical politics and decision making. If the Supreme Court does sit as a "super-legislature," then policy-making will actually be taken from legislatures and placed in the hands of the federal district court and circuit court judges and their state court colleagues. The Supreme Court simply cannot get to any but a small fraction of the policy-making cases of this nation. Secondly, government by judiciary means many basic rules will be made in a process governed by very confining procedures and rules of evidence that prevail in an adversary process. Passionate debates and public concerns will be ruled out in this process. Furthermore, it takes a great deal of money to bring cases through the courts today.

¹³ *Maier v. Roe*, 432 U.S. 464, 469-74 (1977). No consistent majority of the Supreme Court has ever expressed the view that it is a generally permissible role for the Court to dictate general policies on how public money should be spent.

¹⁴ The Courts did not create the mechanism of the New Deal. At most the Supreme Court stepped out of the way of the political forces that sought certain changes and reforms. The Court will be equally incapable of addressing the haunting problems of our nation today—a growing rich-poor gap, eroding education, ballooning health care costs, a penchant to complain about other peoples (currently the Japanese), excessive use of military force in foreign relations, the serious deterioration of cities, etc.

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My first suggestion for reform in choosing a Justice is that our electorate and its representatives end their “Oblomovism”¹⁶ and take a more active role. Rather than worry about one form or another of “judicial activism,” we should seek more progressive legislative and voter activism.

III. A FALSE DICHOTOMY

Popular criticism of what the Supreme Court does is essential. It is also true that we need some broad labels and abstractions in our political and Supreme Court commentaries. However, the idea that the Justices articulate decisions that neatly divide along a “liberal-conservative” line is, I believe, false. It is probably true the individual Justices’ preferences start from political beliefs that might be labeled liberal or conservative. However, the Justices’ instincts or starting preferences must come into contact with actual constitutional premises. For example, whatever the liberalism or conservatism of a Justice, he or she would be bound to admit that the First Amendment must somehow restrain Congress from wholesale prohibition of the circulation of newspapers.

The most important weakness of the liberal-conservative dichotomy is that it *conceals* rather than illuminates what choices the judges are actually making. “Conservative” probably has some core meanings—preserving existing institutions, slow change, honor of tradition, and emphasis on property rights—things of this tenor. “Liberal”, however, is used today to encompass widely disparate and contradictory philosophies about the social order. Some people praise government promotion of affirmative action as “liberal,” and condemn government actions that help traditional family relations because the actions are “conservative.” Whether a local governmental project is called liberal or conservative is likely to depend on whether it is labeled “community action” or “local control.” What really lies at the heart of policy-making on affirmative action, family, and community development is what human needs are served. The use of these labels has obscured American political thinking. In place of thoughtful analy-

¹⁶ Oblomov was the main figure of Ivan Alexandrovich Goncharov’s novel *Oblomov*. He solved most problems by ignoring them and slept his way through most of the novel.

sis, our journalism and political debate is too often mired in a discussion that summarizes various options under one of these two ill-defined rubrics.

Therefore, my second suggestion for improving our choice of a Justice is a plea that commentators and politicians express more thoughtful analyses of issues and rely less on such broad labels as "liberal" and "conservative."¹⁶

IV. LIMITED TERMS FOR JUSTICES

I would like now to explore two specific means of improving the genuinely political role of the Supreme Court. These are ideas that I believe deserve very serious and immediate consideration.

First of all, the terms of the Justices should be limited to a substantial number of years, rather than be appointments for life.¹⁷ Life tenure is intended to serve the purpose of removing the Justices from political influence by making them secure in office. This purpose is most clearly seen in the assurance of economic security provided by Article III's provision that the judges' compensation shall not be diminished while they continue in office. The bulwark against political influence was probably intended to serve the norm of independence of the judiciary, that is, that judges as judicial decision makers ought not to be tampered with by other branches.¹⁸

Judicial independence can be amply assured by a substantial, fixed term of office. The term should be reasonably long in order to allow the Justice to learn his or her role and to develop and

¹⁶ I cannot help but wonder—how will this suggestion be labeled?

¹⁷ Perhaps the terms of other federal judges should be similarly limited as well, but that poses somewhat different questions, so I would like to leave it aside just now. I currently believe that this reform should be adopted, but at this point the critical thing is that the matter should be promptly and fully examined by the Congress.

¹⁸ "Independence of the judiciary" means that courts should be free from external governmental influences when they decide cases. It is a norm intended to assure people that they will have a "day in court" where their cases are decided in accordance with the law and facts. Independence of the judiciary is extremely important in our constitutional system. It appears to be guaranteed by the concept of "separation of powers." See *United States v. Nixon*, 418 U.S. 683, 695-96 (1974); *Chandler v. Judicial Council*, 382 U.S. 1003, 1005-06 (1966) (Black, J., dissenting); *United States v. Klein*, 80 U.S. 128, 147-48 (1872).

"Judicial review" is a distinct concept that refers to the accepted authority of courts (especially federal courts) to review the acts of other entities, especially the *validity of legislation*.

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express some continuity of thought. Also, I believe that a short term would tend to undermine the actual independence of the Justices. If a person is ever appointed to the Supreme Court, he or she has reached the pinnacle of the profession. Fifteen to eighteen years of service on the Court leaves the person with a very valuable basis from which to launch into many successor lines of work in our culture. I do not think it necessary to belabor the point that an unimpeached Justice has the ability to fare very well in our society when a term is over.

A limited term removes one of the bigger fears of politics on the Supreme Court—that the brand of politics of the Court cannot be changed by normal processes. One of the biggest hues and cries of Clarence Thomas's opponents was that he might sit for forty years on the Court. A reasonable term will provide a normal rotation of persons and views on the Court.

Many will take the view that a constitutional amendment is necessary to accomplish this reform.¹⁹ However, the language of the Constitution does not specify life tenure. It provides: "The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour"²⁰ The language states the basis for removal from office, not any particular length of term. Justices are subject to removal only by impeachment because they are "civil officers" within the meaning of the Impeachment Clause of Article II, Section 4. Other civil officers who are subject to appointment and removal by impeachment and whose terms are not specified in the Constitution do not enjoy life tenure. I am not aware of any Supreme Court decision holding that life tenure is actually required by Article III for federal judges, although language in some decisions might be read as assuming that it is required.²¹

Thirty or forty years of tenure is too long a period to allow a

¹⁹ See, e.g., Philip Kurland, *The Constitution and the Tenure of Federal Judges*, 36 U. CHI. L. REV. 665, 697 (1969); Philip D. Oliver, *Systematic Justice: A Proposed Constitutional Amendment to Establish Fixed, Staggered Terms for Members of the United States Supreme Court*, 47 OHIO ST. L.J. 799, 800 n.9 (1986).

²⁰ U.S. CONST. art. III, § 1.

²¹ See *Mistretta v. United States*, 488 U.S. 361, 410 (1989); *Palmore v. United States*, 411 U.S. 389, 407 (1973); see also *Geras v. Lafayette Display Fixtures, Inc.*, 742 F.2d 1037, 1039 (7th Cir. 1984).

small group of individuals to have such a profound effect on the course of our nation. A regular rotation of Justices will allow our Senate and President to sketch out policies, approaches, and even some sensible criteria for selecting members of this important Court.

Given our tradition or expectation of life tenure for the Justices, it might be best in any case to provide for limited terms by amendment rather than by statute. Whatever means is chosen, however, the matter ought to be addressed if the people and Congress are seriously concerned that life tenure tends to produce undue political influence on the Court.

V. THE SENATE SHOULD TAKE AN ACTIVE ROLE

The Constitution provides a very active role for the Senate in nominations. The President "shall nominate, and by and with the Advice and Consent of the Senate, shall appoint" Justices.²² If the Senate is to act "with" the President in the process, it needs to move into the actual examination of potential Justices early, rather than wait on the sidelines until the President sends a name.²³ For example, the Senate could create a search committee from its own ranks to examine potential nominees, then send these when appropriate to the President for his or her examination.

The public should be kept regularly informed of the people whom the Senate Search Committee has on its "short list." Public information will allow people to bring forth genuine, positive qualities of potential nominees, as well as point out potential objections. As it now stands, the nomination process focuses too much on the "negatives." The creation of such a pool would help Senators develop guidelines for selection. Also, more qualified people would realize that it is possible to become a Justice, and might be inspired to develop a sound foundation and "go for it."²⁴ The nomination process seems to be a search for some de-

²² U.S. CONST. art. II, § 2, cl. 2.

²³ My friend and Santa Clara colleague, Professor Russell Galloway, had begun a project to bring about this kind of consideration.

²⁴ My wife, Susan Anawalt, provided the ideas that the pool will help establish guidelines and the rotation will inspire people to "go for it."

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fect that will disqualify the candidate. Every person who is likely to sit on the Court will have some kind of negative aspect. Focusing primarily on negative aspects creates a search for a “safe” nominee, rather than an excellent one.

A search committee function already exists in the White House for nominees, and there has been a deep concern that this search has involved “litmus tests” on such issues as abortion, freedom of religion, and affirmative action. Bringing this function back to the Senate would place it exactly where the Constitution appears to expect it. If “litmus tests” were being used, then the public would certainly have a better chance to learn about them and object.

The Senate should employ professional investigators to look independently into factual questions, such as behavior that relates to the nominee’s capacity or qualifications. That way sensitive questions can be fully examined with attention to human needs of dignity and privacy.²⁵

The actual conduct of the hearings on Supreme Court nominations can be improved as well. The Senators have made many statements about their own understanding of the Constitution during recent hearings. To a certain degree that is necessary, and it has been helpful in educating our own people about the Constitution. However, the Senators need to learn to ask questions. Too many of the “questions” themselves were really speeches. The Senators need to ask some “open” questions and give the nominees more room to explore and explain. Follow-up questions should probe sometimes, and at other times they should simply invite the nominee to move further along a train of thought.²⁶

²⁵ The nomination of Clarence Thomas was marred by the fact that a particularly serious charge of sexual harassment involving the nominee was inadequately examined by the Senate panel during its regular hearings. The suggestion of the Senate’s establishment of an independent investigative staff was made by National Public Radio journalist Nina Totenberg, in a speech to the Santa Clara County Bar Association on January 21, 1991.

²⁶ Some questioning needs to be hard hitting. That was the case in the Clarence Thomas-Anita Hill set of hearings. The nominee determined that he was not going to give his version of the alleged events. Nevertheless, any modestly skilled set of questions could have drawn out aspects related to those events from him. He could have been asked about his usual methods of conferring with staff, his pattern of work with Professor Hill, and a whole range of other questions that would have revealed related facts and aspects of his demeanor in response.

CONCLUSION

We can improve the role of the Supreme Court and the quality of justice by a more thoughtful assessment of nominees' qualities, including constitutional philosophy; placing the political role in proper perspective by being more active through the elective political processes; paying less attention to the false liberal-conservative political dichotomy; limiting the terms of Justices; and instituting the actual constitutional mandate of full senatorial participation in the appointment process.

We are responsible for the kind of society we live in. After all, we construct it. That is the most fundamental lesson of our constitutional experience. We are choosing justice when we select the Justices. Now, it is essential that we turn our attention to dramatically improving that aspect of our democracy.